In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1192

LEON KARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 508 F.2d 1122.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1974. On February 28, 1975, the court of appeals denied petitioner's motion to file an untimely petition for rehearing. The petition for a writ of certiorari was filed on March 19, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *United States* v. *McCormick*, 502 F.2d 281 (C.A. 9), which applied Fourth Amendment warrant requirements to seizures of property subject to forfeiture, should be given retroactive application by the Ninth Circuit.

2. Whether the court below properly construed its prior decision in *United States* v. *McCormick, supra.*

3. Whether *Carroll* v. *United States*, 267 U.S. 132, or *Coolidge* v. *New Hampshire*, 403 U.S. 443, prohibits the warrantless seizure, with probable cause, of a vehicle for forfeiture to the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution and 49 U.S.C. 781 and 782 are set out in Pet. App. 15-16.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on both counts of an indictment charging the possession of counterfeit Federal Reserve notes and plates suitable for printing counterfeit notes, in violation of 18 U.S.C. 472 and 474. He was sentenced to a term of three years' imprisonment.

1. On July 24, 1973, petitioner entered a sporting goods store and made a small purchase, giving the store clerk a $20 bill (Tr. 105, 114-115).[1] Noticing that the bill was counterfeit, the clerk detailed another employee to follow

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[1] "Tr." refers to the reporter's official transcript of petitioner's trial. "R.A." refers to the record lodged with the court of appeals.

petitioner from the store (Tr. 115-116). The employee observed petitioner getting into a gold colored Cadillac and took down the vehicle's license number (Tr. 102-103, 110). This information was given to the Secret Service, which found that the Cadillac was registered to petitioner (Tr. 72).

On July 26 Secret Service agents drove to petitioner's place of business, observed petitioner's 1968 gold Cadillac parked nearby (Tr. 71-72) and placed the vehicle under surveillance. Approximately 25 minutes later, a man matching the description of the person who had passed the counterfeit note emerged from the building, entered the Cadillac, and started the engine (Tr. 73, 239). The agents arrested petitioner and seized his vehicle pursuant to the forfeiture statute, 49 U.S.C. 782 (Tr. 73-74; R.A. 15). There was probable cause to believe the vehicle was subject to forfeiture because of its use in petitioner's counterfeiting activities; there was not, however, probable cause to believe that, at the moment of its seizure, it was being so used (see Pet. App. 2).

A Secret Service agent impounded the Cadillac. While making an inventory of the vehicle's contents he discovered a wallet in the glove compartment (Tr. 74). The wallet contained 56 counterfeit Federal Reserve notes, 34 of which were similar to the note passed at the sporting goods store (Tr. 74-75; R.A. 15-16). During a more thorough search of the car, a number of negatives used in the printing of counterfeit notes were discovered in a box in the back seat (Tr. 76-77; R.A. 16). Both the counterfeit notes and the printing paraphernalia were admitted into evidence at petitioner's trial.

2. On July 17, 1974, the Ninth Circuit decided *United States* v. *McCormick*, 502 F.2d 281 (Pet. App. 5-14). Overruling prior Ninth Circuit precedent, the court of appeals in *McCormick* held that the Fourth Amendment requires officers to obtain a warrant prior to seizing a vehicle for forfeiture to the United States. The court below declined to apply *McCormick* retroactively to petitioner's case (Pet. App. 2-4).

ARGUMENT

1. Petitioner argues that the rule enunciated in *McCormick* should be applied retroactively. This question is relevant only within the Ninth Circuit. Ordinarily it is for the court of appeals to determine the meaning and applicability of its own precedents. There is, therefore, no question of general applicability requiring review by this Court. In any event, the decision of the court of appeals is correct.

The decision of a court usually should be accorded prospective application if the court has announced "a new principle of law * * * [which] overrul[es] clear past precedent on which litigants may have relied" (*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106).[2] Under this test the decision below is correct; the court expressly discarded prior cases, concluding that "they no longer state good law" (*McCormick, supra*, 502 F.2d at 285).

Moreover, *McCormick* represented a departure from principles long accepted by other courts of appeals. This Court has recognized the special legal status of property subject to forfeiture (*United States* v. *Stowell*, 133 U.S. 1, 16-17) and has distinguished between seizures for the purpose of forfeiture and seizures for gathering evidence

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[2]Petitioner contends (Pet. 7) that the definition of a "new rule" contained in *United States* v. *Bowen*, 500 F.2d 960, 975 (C.A. 9), certiorari granted, 419 U.S. 824 ("the decision must either (1) overrule clear past precedent or (2) disrupt a practice long accepted and widely relied upon"), conflicts with the definition in *Chevron Oil Co., supra*. But the court below did not allude to or rely upon the *Bowen* definition, and by either definition it could properly conclude that *McCormick* announced a new rule.

(*Boyd* v. *United States*, 116 U.S. 616, 623). All other courts of appeals to consider the matter have held that no warrant is required to seize a vehicle for forfeiture. *United States* v. *Troiano*, 365 F.2d 416, 418-419 (C.A. 3), certiorari denied, 385 U.S. 958; *United States* v. *Trotta*, 401 F.2d 514, 516 (C.A. 4), certiorari denied *sub nom. Genovese* v. *United States*, 394 U.S. 908; *United States* v. *McKinnon*, 426 F.2d 845, 849-850 (C.A. 5), certiorari denied, 400 U.S. 868; *United States* v. *White*, 488 F.2d 563, 564-566 (C.A. 6); *O'Reilly* v. *United States*, 486 F.2d 208, 210-211 (C.A. 8), certiorari denied, 414 U.S. 1043; *United States* v. *Stout*, 434 F.2d 1264, 1266-1267 (C.A. 10). The holding in *McCormick* therefore was "a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248) that "effected a decisional change in attitude" from one that had long prevailed (*Gosa* v. *Mayden*, 413 U.S. 665, 673).

This Court has consistently recognized that the Fourth Amendment would not be served by retroactive application of the exclusionary rule, which is a "procedural weapon that has no bearing on guilt" (*Linkletter* v. *Walker*, 381 U.S. 618, 638). The *McCormick* rule "is calculated to prevent, not to repair. Its purpose is to deter [future conduct] * * * by removing the incentive to disregard" the constitutional guarantee (*United States* v. *Calandra*, 414 U.S. 338, 347 (quoting *Elkins* v. *United States*, 364 U.S. 206, 217)). The prophylactic rule created by *McCormick* could not affect conduct that had occurred prior to its announcement, and consequently should be applied prospectively only. *Linkletter* v. *Walker, supra*, 381 U.S. at 637.

2. Petitioner also contends that the court below failed properly to interpret its earlier decision in *McCormick* This is a matter to be resolved within the court of appeals, and presents no conflict among the circuits requiring consideration by this Court.

3. Petitioner finally contends that the Ninth Circuit's decision in *McCormick* was compelled by this Court's prior decisions in *Carroll* v. *United States*, 267 U.S. 132, and *Coolidge* v. *New Hampshire*, 403 U.S. 443, so that the proper date for "retroactivity" analysis was the date of decision of *Coolidge*. But the plurality opinion in *Coolidge* does not support such an argument; *Coolidge* involved a search of a car for the purpose of gathering evidence, and the car was, at the time of its search, in the driveway of the defendant's home. Here, by contrast, the Secret Service agents seized petitioner's car from a public place for forfeiture to the United States. Under 49 U.S.C. 782, when a car has been used for certain purposes its title vests in the United States, and the Secret Service agents therefore were seizing property which, they had probable cause to believe, was the property of the United States.[3] If they were incorrect, and were interfering with a legitimate proprietary interest of petitioner, that interference could be rectified in subsequent judicial proceedings. In *Coolidge*, however, the interference was with defendant's privacy interest, and rectification at a later date would be difficult if not impossible. This Court has never invalidated a probable cause seizure of a vehicle from a public place, and it therefore is not accurate to contend that *Coolidge* either compelled or foreshadowed the result in *McCormick*. Cf. *Cardwell* v. *Lewis*, 417 U.S. 583; *Cady* v. *Dombrowski*, 413 U.S. 433, 446-447; *Chambers* v. *Maroney*, 399 U.S. 42, 51-52.

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[3]Once the agents had properly seized the vehicle for forfeiture, they were entitled to conduct an inventory search and to make use of any contraband or evidence discovered. *Cooper* v. *California*, 386 U.S. 58.

CONCLUSION

For the foregoing reasons it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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